In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-824

IRVING DAVIS, M.D.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner, Irving Davis, M.D., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 11, 1977.

OPINION BELOW

In the United States Court of Appeals for the Ninth Circuit, an Opinion was rendered and filed October 11, 1977, and annexed hereto as Appendix 2. The Opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported.

JURISDICTION

The Judgment and Opinion of the Court of Appeals for the Ninth Circuit was entered October 11, 1977 (appended hereto as Appendix 2). A timely petition for rehearing was denied en banc on November 11, 1977. The United States Court of Appeals for the Ninth Circuit issued its order staying issuance of mandate to and until December 9, 1977. This petition was filed within 30 days of November 11, 1977. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does Title 21 U.S.C. Secs. 811, 812, and 841(a)(1) represent a delegation of congressional power which violates Article I, Section 1 of the United States Constitution pursuant to this Court's holdings in *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935) and *Schechter Poultry Corporation v. U.S.,* 295 U.S. 495 (1935)?

The Court below answered "No".

2. Is it plain error within the meaning of Rule 52 to admit government expert testimony on the ultimate issue of guilt or innocence?

The Court below answered "No".

3. Did the argument of government counsel amount to plain error pursuant to Rule 52, Federal Rules of Criminal Procedure?

The Court below answered "No".

STATUTORY AUTHORITIES

1. Provisions from the United States Constitution

First Amendment:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

2. **Title 21 U.S.C. Sec. 811, et seq. (Appendix 4).**

3. **Title 21 U.S.C. Sec. 812 (Appendix 5).**

4. **Title 21 U.S.C. Sec. 841 (Appendix 6).**

5. **Federal Rules of Criminal Procedure:**

Rule 52:

HARMLESS ERROR AND PLAIN ERROR

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

6. **Federal Rules of Evidence:**

Rule 704:

OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 403:

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

On June 30, 1976, Appellant was indicted for a violation of Title 21, United States Code §841(a)(1), to wit, distribution of controlled substances. The indictment contained Count One through Count Twenty alleging that on each of twenty separate occasions, Petitioner, a physician, unlawfully prescribed and caused to be distributed to an ultimate user, certain Controlled Substances listed in schedules included in Title 21, United States Code, §812, and Title 21, Code of Federal Regulations, Chapter 2 Part 1308, and that said acts of distribution in each instance were not in the usual course of professional practice and were not for a legitimate medical purpose. (C.T. 1).[1]

On August 6, 1976, defendant pled not guilty to each and every count of the indictment. (C.T. 211).

On Monday, November 15, 1976, the trial of Appellant commenced. The trial continued from day to day until Friday, November 19, 1976.

On November 17, 1976, the Court instructed the jury and the jury commenced its deliberations. There-

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[1]All designations by "C.T." are to the Clerk's Transcript on appeal.

after, the jury returned its verdict of "guilty" as to Count One through Count Twenty of the indictment herein.

On December 10, 1976, the Court rendered its judgment that defendant is guilty as charged in each of Counts One through Twenty of the indictment, and that the defendant be and is hereby sentenced to five years probation, and, a fine of $1,500 on each of said twenty counts, or, a total fine of $30,000. (C.T. 204) (appended hereto as Appendix 1).

On December 15, 1976, defendant filed his Notice of Appeal from the judgment of the trial court. (C.T. 205).

The convictions of Petitioner rested on the testimony of three undercover agents sent into Petitioner's office by the Drug Enforcement Administration for the purpose of investigating his prescribing practices. Each undercover agent held herself out as a former patient of the doctor and each testified they were given drugs by Petitioner upon request without a physical examination or other indictions of medical need. (R.T. 0085 through R.T. 0352)[2] The drugs prescribed were controlled substances listed under Schedule 2 pursuant to Title 21, U.S.C. Sec. 812(a), to wit: Seconal, Tuinal and Ritalin as charged in the indictment.

In the course of the trial, an expert witness called by the government, Dr. Frederick Meyers, testified

[2]All references by "R.T." are to the Transcripts of Trial Proceedings in *U.S. v. Irving Davis, M.D.*, U.S. District Court, Northern District of California, No. CR 76-373.

to his opinion that the drugs prescribed for the undercover agents were not prescribed in the usual course of professional practice and for a legitimate medical purpose. (R.T. 0487, lines 3 through 8; page 0491, line 16).

Furthermore, the government expert gave the further opinion that the defendant was simply "selling scripts" rather than practicing medicine. (R.T. 0492, line 1).

The trial court overruled all objections thereto, holding that the experts were entitled to give their opinion as to what the ultimate question is. (R.T. 0492).

At the conclusion of the trial, both counsel argued. The United States Attorney engaged in the following argument (taken from the context of closing arguments reported at R.T. 0826 through R.T. 0909):

> ". . . and when a doctor is under investigation, and it's believed that he is engaging in illegitimate prescription practices, it's their job to go and find out if that's happening."
>
> (R.T. 0828:19-22).
>
> "And do you think . . . people who are addicts, and hypes, and drug abusers, are going to turn in, and turn over on, their source and testify against their source?"
>
> (R.T. 0829:6-8).
>
> "They write prescriptions for people in situations where they know these drugs are going to be abused; and they do it for money."
>
> (R.T. 0830:7-9).

"Perhaps it's symptomatic of our society that drugs are too much a part of it. And people rely on them too much. And that might be partly the fault of the doctors and the drug companies. But that's not really part of this case."

(R.T. 0832:14-17).

"There's even testimony that his—his receptionist, his very own receptionist, was high on drugs when he was there at the office.

"Now I ask you: what kind of treatment was being conducted——

Mr. Martinez: Pardon me, your Honor, I'm . . . interrupting, with reluctance . . .

The Court: Your objection is sustained.

Mr. Martinez: Thank you. May the remarks of counsel——

The Court: There's no evidence that the receptionist was high on drugs.

Mr. Eddelman: Well, there was the testimony of a witness, your Honor, that she believed he was.

The Court: Well . . .

Mr. Martinez: As a matter of fact, I should make my record on this——

The Court: Yes. The objection is sustained.

Mr. Martinez: ——to strike it out, and ask the jury to be instructed to disregard it, please, your Honor."

(R.T. 0840:8-25).

". . . When doctors cease acting as doctors, and become purveyors of drugs on the street, and makes it easy for people who are drug abusers to obtain drugs, then something has to be done.

And with Dr. Davis, I think something has to be done."

(R.T. 0843:16-20).

". . . the testimony that you've had, that people have come forward and given is that at no time in any visit did they ever say why they wanted the medication. I mean that's the evidence. That was part of their training and that was how they were instructed. 'Don't tell the doctor why you want the medication' . . ."

(R.T. 0902:24 through 0904:4).

"People come in, they get these drugs and they go out on the street and they sell them because things like Ritalin and Seconal go for two or three dollars a pill out on the street; and it's just great, you know, if you can get them from doctors and there are doctors, script doctors what know this and this is how they make money, they don't practice medicine, they write script."

(R.T. 0904:18-24).

". . . maybe in his own mind, he felt that it's better to give to people out on the street whatever they want so they don't have—they can get it without having to buy it on the street. Maybe that's the way he runs his practice, to avoid having people to have to spend the two or three dollars a tab."

(R.T. 0905:5-10).

". . . there are doctors that don't practice medicine anymore, but just write script to make money, do things not in the interests of their patients. Giving these restrictive drugs to a person who is an abuser is not doing something in the interests of the patient. It's letting a person continue with his abuse and it's making a small profit on each transaction on the side, so the doctor profits and he's not doing anything to alleviate suffering. He's promoting and maybe counsel——

Mr. Martinez: Pardon me, your Honor, I'm listening to this and there is no evidence on the question to which counsel is addressing himself and I'm—as much as I am reluctant to interrupt——

The Court: Well, tell me what part.

Mr. Martinez: May I move to strike out the argument he is making in generalities about the street people in whatever context he just stated it, and I am asking the Court to admonish the jury to disregard it.

There is no evidence in regard to doctors generally and the abuse problems, et cetera.

The Court: That's correct. There isn't that.

Mr. Eddelman: No, your Honor. I am just responding to his argument about the kind of patients the doctor treats and his intentions. That's been brought up.

The Court: That's a little different than the statements that you made, 'We all know doctors sell script.' I don't think there is any evidence that we all know that doctors sell script, so there is no evidence before this jury of that."

(R.T. 0906:15 through 0907:18).

OPINION BELOW

In its opinion filed October 11, 1977 (Appendix 2), the Court of Appeals considered, in turn, each of the questions presented to this Court for review. In deciding that 28 U.S.C. Secs. 811 and 812 is not an unconstitutional delegation of congressional power, the Court of Appeals reasons that the 1935 Supreme Court cases, *Panama Refining Company v. Ryan,* 293 U.S. 388 (1935) and *Schechter Poultry Corporation*

v. United States, 295 U.S. 495 (1935) to be inapplicable to the comprehensive drug abuse prevention and control act insofar as that act delegates authority to the Attorney General and to the Administrator of the Drug Enforcement Administration with respect to amendment of schedules listed in 21 U.S.C. 812. The Court of Appeals relies on *United States v. Piatti,* 416 F.Supp. 1202, 1205 (E.D. N.Y. 1976) the holding of which distinguishes *Panama Refining Company v. Ryan,* supra, 293 U.S. 388 (1935) and, *Schechter Poultry Corporation v. United States,* supra, 295 U.S. 495 (1935) on the facts. No case is cited by the opinion of the Court of Appeals as overruling or clearly distinguishing *Panama Refining Co.,* or *Schechter Poultry Corporation* from that of Petitioner (as will be discussed in the argument), but the Court of Appeals refers to and seems influenced by 1 Davis, *Administrative Law Treatise,* Section 2.01, which theorizes that the *Panama* case was an unusual one which would not be followed today by this Court. Furthermore, that the *Schechter* case involved "excessive delegation of the kind that Congress is not likely again to make." 1 Davis, *Administrative Law Treatise,* Section 2.01. (Opn. Court of Appeals, Appendix 2, page viii, fn.).

Otherwise, the Court of Appeals cites as contrary to the position of Petitioner herein, *United States v. Piatti,* 416 F.Supp. 1202, 1205, and *United States v. Benish,* 389 F.Supp. 557 (1975), affirmed without opinion. (Opn., page vii). Each, in substance, seems to conflict with *Panama* and *Schechter.*

The exclusive authority cited by the Court of Appeals from this Court is *U.S. v. Moore,* 423 U.S. 122, 144-145 (1975), which does not decide the issue of delegability of the congressional power herein complained of.

On Petitioner's complaint that the expert testimony of government witness Dr. Frederick Meyers "on the ultimate issue" was improperly admitted, the Court of Appeals holds that Rule 704 of the *Federal Rules of Evidence* forecloses the issue. (Opn., page x).

Futheremore, to the final issue presented here for review, the Court of Appeals concludes that the opening statement of Defense Counsel demonstrated that both sides went beyond the usual limit of personal opinion in arguments, and there was, therefore, no reversible error. (Opn., page xvi). However, the statements of the government attorney seem in no way to answer the substance thereof. Certainly, pursuant to the authorities, such improper statements cannot be justified by the opening statement of counsel for the Petitioner. No other justification or explanation of the prosecutor's remarks is set forth in the opinion below. (Appendix 2). With these and other views expressed in Appendix 2, the Court of Appeals affirmed all convictions.

QUESTIONS PRESENTED
AND
SUMMARY OF ARGUMENTS

The Statute Under Which Defendant Was Charged and Convicted Represented an Unconstitutional Delegation of Congressional Power; Furthermore, Opinions of Government Experts and Arguments of Government Counsel Infected the Proceedings.

Certiorari should be granted because:

A. The issue turns on the question of the propriety of congressional delegations of its authority and power pursuant to the United States Constitution, Article I, Section 1.

B. The validity of such congressional delegations of its power to the executive branch of our government is not answered by the current authorities.

C. The singular authority from the United States Supreme Court on this issue seems to be *Panama Refining Company v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935) and *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), which authority though still the law is observed in the breach by U.S. Courts throughout the country.

D. The law promulgated by *Panama* and *Schechter Poultry Corp.* has led to conflicting decisions in the states: disregarded by some, and distinguished by others, but never directly acted upon by this Court; and

E. Involves an area of law which particularly lends itself to the scrutiny of this Court inasmuch as, otherwise, there is unchecked interaction herein

between the legislative and executive branches of our government.

F. Resulting from the freely expressed opinion of guilt by the government expert witness, and, the often repeated, clearly improper arguments by the government attorney, petitioner has been denied an impartial jury (U.S. Constitution, Amendment VI), and due process of law (U.S. Constitution, Amendment IX). The opinion of the Court of Appeals seems not to come to grips with the issues presented; not even discussing in context the remarks complained of by the government attorney.

Such departures from the accepted and usual course of judicial proceedings ought to be reviewed by this Court.

ARGUMENT

I

THE ISSUE OF IMPROPER DELEGATION ARISES UNDER THE FIRST AMENDMENT. THE INDICTMENT AND CONVICTION OF PETITIONER WAS BY EXECUTIVE ACTION DEFINING A CRIME PURSUANT TO AUTHORITY DELEGATED BY CONGRESS. SUCH DELEGATION MUST STAND THE SCRUTINY OF THIS COURT IF OUR SYSTEM BASED ON CHECKS AND BALANCES IS TO BE MAINTAINED.

Panama Refining Company v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); and
Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

Our claim before the Court of Appeals, and now, is that republishing of schedules listed in 21 U.S.C.

Sec. 812 and with omissions or additions made pursuant to 21 U.S.C. Sec. 811(a) does, in effect, create crimes and penalties therefor. A flaw leading to our claim of invalidity, is that nowhere in the "Act"[3] is there a provision requiring or permitting that Congress review, affirm, or ratify the publication or republication of schedules creating new offenses by the inclusion of drugs, or by the reclassification of drugs previously included. To "add" [21 U.S.C. Sec. 801(1), 810(1)], to "transfer" [21 U.S.C. Sec. 811(1) and (2)] and to "remove" [21 U.S.C. Sec. 811(2)] actually is an exercise by the Attorney General, the Adminis-

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[3] 21 U.S.C. Sec. 811(a) provides in relevant part that
". . . the Attorney General may by rule (1) add to such a schedule or transfer between such schedules any drug or other substance if he—
(A) finds that such drug or other substance has a potential for abuse, and
(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or
(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule."

21 U.S.C. Sec. 811(c):
"In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:
(1) Its actual or relative potential for abuse.
(2) Scientific evidence of its pharmacological effect, if known.
(3) The state of current scientific knowledge regarding the drug or other substance.
(4) Its history and current pattern of abuse.
(5) The scope, duration, and significance of abuse.
(6) What, if any, risk there is to the public health.
(7) Its psychic or physiological dependence liability.
(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter."

trator of the Drug Enforcement Administration, or possibly designated subordinates, of a power appropriately reserved to Congress. Furthermore, a drug can be included in any schedule even though not previously subject to control, Title 21 U.S.C. Sec. 811(b), (c). The Court of Appeals, in relying on *United States v. Piatti,* 416 F.Supp. 1202, 1205 (E.D. N.Y. 1976) holds that delegation of the power complained of herein is constitutional if accompanied by sufficient guidelines and standards for the exercise of authority. (Appendix 2, pages vi-vii).

It is true that the Attorney General must consider eight factors outlined in 21 U.S.C. Sec. 811(c) in determining whether to include a drug.

That the included drugs have "potential for abuse" is the first requisite and seems critical. However, nowhere in the Act are there guidelines for evaluation of such a potential, and absent thereof such a standard seems so vague as to be utterly without intelligible content depending only on the subjective attitudes of those entrusted to make that determination.[4]

In *Howell v. Mississippi,* 300 So.2d 774 (Miss. 1974) the Supreme Court of Mississippi held unconstitutional state legislation closely modeled on the Federal legislation here in question, 21 U.S.C. Sec.

[4]If potential for abuse is the actual test, consider the relative position of alcohol and aspirin on the schedules. Alcohol, it can be noticed, is thought by some to rank with heroin in potential harm, and is the subject of addiction for millions of Americans. Untold thousands of children perish each year from the accidental ingestion of aspirin. Neither drug is contained on the schedules.

811, et seq. The Supreme Court stated that action of the state administrative agency (the State Board of Health) in rescheduling amphetamines from State Schedule 3 to State Schedule 2, and thereby increasing the criminal liability for unauthorized possession, "infringed on the separation of the powers of the government and is prohibited".

The Supreme Court of Mississippi held:

> "the authority to define crimes and fix the punishment therefor is vested exclusively in the legislature, and it may not delegate that power either expressly or by implication. . . ." at 781.

In *Hampton v. Mow Sun Wong,* 426 U.S. 122 (1976), Mr. Justice Rehnquist reflects somewhat on the United States Supreme Court's failure to review the applicability of the holding in *Schechter Poultry v. United States,* supra, 295 U.S. 495, and *Panama Refining Company v. Ryan,* supra, 293 U.S. 388, and does not determine the answer to Mr. Justice's own query as to whether such authorities "are still viable or whether they now rest on a rusted concept". Mr. Justice Rehnquist, however, acknowledges that *Schechter Poultry* was relied upon by the Supreme Court in *National Cable Television Association, Inc. v. United States,* 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed. 370 (1974), which would seem to tip the scales to viability, if, indeed, of a rusted concept too long ignored by this Court.

Leaving the apparent lack of uniformity of view, and considering, in context, *Panama Refining Company v. Ryan,* supra, and, *Schechter Poultry Cor-*

poration, supra, in each case, Congress legislated to the President of the United States certain excess powers found to be an unconstitutional delegation. In *Panama* the President was held to have no power to prohibit the shipment in interstate commerce of oil produced in excess of state quotas. A significant factor in this Court's decision to strike down the delegation was that the regulations, as here, bore criminal penalties for their violations.

In *Schechter,* the delegation was of the power to formulate codes of "fair competition" for industry. The stated policy was:

> ". . . to eliminate unfair, competitive practices, to promote the fullest possible utilization of the present productivity of industries . . . and otherwise, to rehabilitate industry . . ." *S.P. Corp.,* supra.

In *U.S. v. Louisville and N.R. Company,* 176 F. 940 (1910) at page 944, the Court defines the standard:

> "A crime can be created only by a public act, and the language of the act must be sufficient to completely declare and define the crime and affix punishment. It is not competent for Congress to delegate to the President or the head of an Executive department the power to declare what facts constitute an offense."

The principle is further enunciated in *United States v. Eaton,* 144 U.S. 677 at 687 (1972):

> ". . . there is a principle of criminal law that an offense which may be the subject of criminal procedure, is an act committed or omitted 'in violation of a public law either forbidding it or commanding it' ".

The failure in regard to 21 U.S.C. Secs. 801 et seq. is that once enacted an unspecified individual designated as the Attorney General has the authority to add new substances to the schedules thereby creating new crimes. That the power is invested in the chief prosecutor of the nation we feel to be of significance, and again, seems to erode the system of checks and balances so carefully preserved in the Constitution.

The vagueness of the statute in question is illustrated by 21 U.S.C. Sec. 811(c) which merely requires that the Attorney General and, where applicable, the Secretary of Health, Education and Welfare "consider" the factors prescribed for inclusion of a drug on the schedule. The formal findings specified in Secs. 811(a) and 812(b) remain based on subjective consideration of the Attorney General. Even though the responsibility of investigating the eight factors listed in Sec. 811(c) is shared with other arms of the executive branch by virtue of Sec. 811(b) the Act does not provide Congress with the power to review or to ratify the creation of crimes thereunder.

The issue should be reviewed, and petitioner's rights determined only incidentally to the interest of clearing, once and for all, the ambiguous position of this Court thereon.

II

NOTWITHSTANDING RULE 704 OF THE FEDERAL RULES OF EVIDENCE, IT IS PLAIN ERROR PURSUANT TO RULE 52 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE TO ADMIT GOVERNMENT EXPERT TESTIMONY THAT PETITIONER WAS "SELLING SCRIPTS" AND NOT PRACTICING MEDICINE.

The testimony complained of is as follows:

"Q. Now, doctor, I'm going to direct your attention specifically now to the three people that testified in this case, Ms. Dalton, Ms. Detro and Ms. Crane. I direct your attention to the experiences which they have related concerning their visits to Dr. Davis.

Now, in view of the materials you have been furnished and your discussions with me and your view of the photographs, have you been able to form an opinion as to whether or not, in the usual course of professional practice— excuse me, let me rephrase that, *have you been able to form an opinion as to whether or not these drugs that were prescribed for these three people were prescribed in the usual course of a professional practice and for a legitimate medical purpose?*

A. In my opinion, they were not."

Page 0487:3-8:

"Q. Would it be fair to say, then, in your professional opinion as a doctor, that with respect to the prescriptions issued to Sharon Dalton on the dates of her visits, that they were not issued in the usual course of a professional practice, nor for a legitimate medical purpose?

A. That's my opinion . . ."

Page 0489:9-17:

"Q. Do you have an opinion whether the prescriptions that were issued to her, based on reports of her visits, were issued in the course— in the usual course of a professional practice, and for a legitimate medical purpose?

A. I have such an opinion.

Q. O.K. And what is your opinion?

A. I think it's the same as in the other two cases; that this was not—this does not represent the practice of medicine."

Page 0491:16:

"Q. Doctor, finally, in your opinion, when Dr. Davis wrote these prescriptions, was he practicing medicine or just writing script?

A. Well, he was—

Mr. Martinez: Pardon me, your Honor, I think this is going to be an ultimate question for the jury.

The Court: Well, experts are entitled to give their opinion as to what the ultimate question is and the jury's questions is another question separate from that. Your objection is overruled."

Page 0492:1:

"Mr. Martinez: Very well, thank you.

Mr. Eddelman: Q. Yes, Doctor, go ahead.

A. In my opinion, this pattern is that of a doctor who is selling scripts rather than practicing medicine."

The position of Petitioner is that the controlling case is *United States v. Green,* 511 F.2d 1062 (1975). In that case, the defendant complained that the expert testimony of Dr. Howard D. Kurland as to

customary procedures followed by licensed medical physicians and treating a new patient prior to prescribing a controlled substance as medication invaded the province of the jury. The Court responded as follows:

> "While it may be true that *an expert should not be allowed to express a conclusion upon the ultimate issue of fact to be decided by the jury* [*United States v. Spaulding,* 293 U.S. 498, 55 S.Ct. 273, 79 L.Ed. 617 (1935)], the testimony of Dr. Kurland in the present case was entirely proper. *Here* Dr. Kurland merely testified as to what customary medical procedure was generally followed before the prescribing of drugs. *He did not comment on whether the procedures followed by the defendant were appropriate, given the individual nature of his patients' conditions. That question was properly left for the jury's determination* . . . (Emphasis added) *United States v. Bartee,* 479 F.2d 484, 488 (10th Cir. 1973); *Heller v. United States,* 104 F.2d 446, 449 (4th Cir. 1939)."
>
> *United States v. Green,* 511 F.2d 1062 at 1072-73.

The United States Court of Appeals determined that the Federal Rules of Evidence, adopted January 21, 1975, and the cases cited by the government thereafter, were controlling and rendered all authority prior thereto obsolete. See Appendix 2, pages x-xi.

In *U.S. v. McCoy,* 539 F.2d 1050 (9th Circuit, 1976) relied upon by the Court of Appeals, the Court stated that even if the conclusion offered therein be permissible,

> "We have frowned upon the practice of asking an expert to give conclusions as to the entire case."

To the degree that the opinion of the government experts invade the province of the jury, we feel it to be outside the language of Rule 704. Furthermore, the Federal Rules of Evidence, Rule 403, provides that even relevant evidence may be excluded if there is unfair prejudice. The conclusions complained of from the government expert were not needed to assist the trier of fact, and, the opinion of the government expert that petitioner was not practicing medicine but was "selling scripts" creates exactly the kind of prejudice the application Rule 403 is designed to prevent. Any apparent conflict should be reviewed by this Court and uniformity established.

A query is whether Rule 704 of the Federal Rules of Evidence in this case has by its application deprived Petitioner of a trial by an impartial jury pursuant to the United States Constitution, Amendment Six, and, amounting to a denial of due process of law guaranteed by the United States Constitution, Amendment Fourteen.

III

WE ASK FOR CONSIDERATION OF OUR POSITION THAT ARGUMENTS ENGAGED IN BY THE UNITED STATES ATTORNEY AMOUNTED TO PLAIN ERROR (RULE 52).

We feel the issue for this Court is whether or not there has been application of the concept of fairness pursuant to Amendment Fourteen, United States Constitution. It has been said:

"Due process of law requires that the procedings shall be fair, but fairness is a relative, not an absolute concept . . . what is fair in one set of circumstances may be an act of tyranny in others".

Snyder v. Massachusetts, 279 U.S. 97, 116, 177 (1934).

Also, it has been said that:

"as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness is essential to the very concept of justice. In order to declare a denial of it . . . (the court) must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

Lisenba v. California, 314 U.S. 219, 236 (1941).

It is not claimed in the opinion of the Court of Appeals that defense counsel's opening statement, or evidence in the case during the trial, supported the construction of the United States Attorney's remarks in closing argument that Petitioner was the source of drugs for addicts and hypes and drug abusers (R.T. 0829:6-8); that his own receptionist was high on drugs, that Dr. Davis had "become (a) purveyor of drugs on the streets". (R.T. 0843:16-20). Application of the standard set by the Seventh Circuit in *United States v. Fearns,* 501 F.2d 486, 489 seems appropriate:

". . . the fundamental rule known to every lawyer, is that argument is limited to the facts in evidence . . . in any event counsel are never justified in arguing facts not of record." At page 489.

In *United States v. Kung How Fong,* 475 F.2d 189 (Ninth Circuit 1973) the Court alludes to prejudicial and inflammatory remarks from government attorneys being cause for reversal if there is prejudice to a defendant's "chance to receive a fair trial". *Kung How Fong* does not examine the standard but cites *United States v. Cummings,* 468 F.2d 274 (Ninth Circuit 1972). In *Cummings* the United States Attorney discussed in detail the mechanics by which a defendant is indicted. The inference clearly was the defendant must be guilty to have been prosecuted. The Court recognized the extreme prejudice and stated:

"Where is the presumption of innocence here? Where the requirement that the jury consider only the evidence in the case; where the government's burden to prove its case beyond a reasonable doubt?" At page 278.

We feel the Court of Appeals in its opinion affirming the conviction of Petitioner has rendered a decision in conflict with the authorities on the same matter, has decided an important question of Federal law which has not been but should be settled by this Court and has decided a Federal question in conflict with the applicable decisions of this Court relative to due process of law. Furthermore, in the opinion of the Court of Appeals, the concern is with the opening statement of Defense Counsel rather than with the remarks of the prosecutor. The failure of the Court of Appeals to consider the government attorney's remarks in the context of the authorities sanctions a departure from the accepted and usual

course of judicial proceedings calling for an exercise of this Court's power of supervision.

SUMMARY AND CONCLUSION

The Supreme Court should settle the recurring delegation questions resulting in confusing and contradictory decisions in the lower courts. The interest of this Court is in preserving the system of checks and balances, and, indeed, reserving to Congress the powers invested in that body by the United States Constitution.

Furthermore, a clarification of the standards of this Court relative to due process of law is appropriate in connection with the complaints of Petitioner herein that government witnesses and the United States attorney, by their remarks, infected the proceedings. Is it appropriate under the Rules of Evidence for a government expert to give an opinion of guilt and a United States Attorney to suggest to a jury that there are incriminating facts known to him which have not been developed in the evidence?

A Writ of Certiorari should issue to review the opinion of the Court of Appeals for the Ninth Circuit herein.

Respectfully submitted,

GEORGE C. MARTINEZ,

Counsel for Petitioner.

Dated, December 8, 1977.

(Appendices Follow)

Appendices

Appendix 1

United States District Court for the
Northern District of California

Docket No. Cr 76-373 SC

United States of America

vs.

Irving Davis, M.D.,

Defendant.

[Filed Dec. 10, 1976]

Counsel

In the presence of the attorney for the government the defendant appeared in person on this date (December 10, 1976).

[ ] Without Counsel However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] With Counsel George C. Martinez, Esq.
(Name of counsel)

Plea

[ ] Guilty, and the court being satisfied that there is a factual basis for the plea.

[ ] Nolo Contendere.

[X] Not Guilty.

Finding & Judgment

There being a verdict of

[ ] Not Guilty. Defendant is discharged

[X] Guilty.

Defendant has been convicted as charged of the offense(s) of distribution of controlled substances, in violation of Title 21, U.S.C., Section 841(a)(1) as charged in a twenty-count indictment.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

IT IS ADJUDGED that the defendant is placed on probation for a period of FIVE (5) YEARS; and the defendant is to pay a fine to the United States in the sum of fifteen hundred ($1,500.00) dollars as to each of the twenty (20) counts for a total of thirty thousand ($30,000.00) dollars to be paid in such amounts as are determined by the Probation Department.

Special Conditions of Probation

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by [X] U.S. District Judge

/s/ Samuel Conti

Date 12/10/76

Entered in Criminal Docket 12/13/1976

Appendix 2

United States Court of Appeals
for the Ninth Circuit

No. 76-3720

United States of America,
Plaintiff-Appellee,
vs.
Irving Davis, M.D.,
Defendant-Appellant.

[Filed Oct. 11, 1977]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: BARNES and WRIGHT, Circuit Judges, and JAMESON,* District Judge

BARNES, Senior Circuit Judge:

A jury convicted Irving Davis, M.D., on 20 counts for having, on 20 separate occasions, unlawfully "prescribed and caused to be distributed to an ultimate user" certain quantities of "controlled substances" listed in 21 U.S.C. § 812 and Title 21 Code of Federal Regulations, Chapter 2, Part 1308, which acts of distribution in each instance were not in the usual course

*Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

of professional practice and were not for a legitimate medical purpose. The drugs involved herein were Seconal, Ritalin and Tuinal.

Counsel for defendant moved (a) for judgment of acquittal, as to each count, at the conclusion of the Government's case (Rule 29 of the Federal Rules of Criminal Procedure ["FRCrP"]); (b) for judgment of acquittal on each count after the case went to the jury (Rule 29(c) of the FRCrP); (c) for a new trial (Rule 33 of the FRCrP); and (d) for arrest of judgment after trial (Rule 34 of the FRCrP). All such motions were denied.

Appellant was sentenced to five years probation, and a fine of $1500 on each of the 20 counts, a total fine of $30,000. This appeal follows. We have jurisdiction. (28 U.S.C. § 1291).

Appellant raises the following issues:

1. Whether 28 U.S.C. § 811 amounts to an unconstitutional delegation of Congressional power.

2. Whether the independent, knowing actions by government agents can be an element of the offense and charged against the defendant.

3. Whether the trial court erred in admitting conclusionary testimony of the government expert.

4. Whether the trial court erred in admitting into evidence certain photographs obtained by allegedly unconstitutional methods and supposedly withheld from defense counsel prior to the day of trial.

5. Whether the trial court erroneously instructed the jury as to the law.

6. Whether the argument of government counsel was plain error within the meaning of Rule 52 of the FRCrP.

7. Whether the evidence was, as to all counts or certain enumerated counts, insufficient as a matter of law.

8. Whether the 20 counts herein were multiplicious. We consider each issue in turn.

I

Appellant initially argues that Congess, in passing the Comprehensive Drug Abuse Prevention & Control Act (herein "the Act") has unconstitutionally delegated its authority to define a crime and specify penalties for its violation to the Attorney General (and to the Administrator of the Drug Enforcement Administration) with respect to amendment of the schedules listed in 21 U.S.C. § 812. Without citing specific case authority, appellant makes the claim that any republishing of the schedules, with any omissions or additions made pursuant to 21 U.S.C. § 811(a),[1] "would in effect, be a determination of a new drug crime and new penalties."

[1]21 U.S.C. § 811(a) provides in relevant part that
". . . the Attorney General may by rule
(1) add to such a schedule or transfer between such schedules any drug or other substance if he—
(A) finds that such drug or other substance has a potential for abuse, and
(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or
(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule."

The cases are against any such proposition. *United States v. Benish,* 389 F. Supp. 557 (1975), affirmed without opinion; *United States v. Benish,* 523 F.2d 105 (1975), *cert. denied,* 424 U.S. 954 (1976); *United States v. Rosenberg,* 515 F.2d 190, 196-197 (9th Cir.), *cert. denied,* 423 U.S. 1031 (1975); *United States v. Piatti,* 416 F. Supp. 1202, 1205 (E.D.N.Y. 1976).

The federal courts have long held that Congress may validly provide a criminal sanction for violation of rules or regulations which it has empowered the President, a cabinet member or an administrative agency to promulgate. *Avent v. United States,* 266 U.S. 121, 130-131 (1924); *McKinley v. United States,* 249 U.S. 397, 399 (1919); *United States v. Grimaud,* 220 U.S. 506, 512-514 (1911); *United States v. Berrigan,* 482 F.2d 171, 182-183 (3rd Cir. 1973). Such delegation of authority must be accompanied by sufficient guidelines and standards for the exercise of the authority. There are sufficient guidelines and standards expressed in the language of 21 U.S.C. § 811 itself (*see* subsections (b) and (c) of § 811), in addition to the application of the protections of the Administrative Procedure Act. *United States v. Eddy,* 549 F.2d 108, 112-113 (9th Cir. 1976).

Appellant relies heavily on two 1935 Supreme Court cases, *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935) and *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). The Government quotes 1 Davis, Administrative Law Treatise, Sec. 2.01 in reply.[2] How-

[2]". . . [n]either delegation was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected

ever, the prosecution also relies on the previous decisions of this court based on facts somewhat similar to those here appearing. They are: *United States v. Goldfine,* 538 F.2d 815, 819 (9th Cir. 1976); *Rosenberg, supra,* 515 F.2d at 195; *United States v. Larson,* 507 F.2d 385 (9th Cir. 1974); and particularly the Supreme Court's unanimous decision in *United States v. Moore,* 423 U.S. 122, 144-145 (1975). "The implication is that physicians who go beyond approved practice remain subject to serious criminal penalties." *Id.*

We agree that the cases from this circuit, as well as other circuits and districts are controlling on the first issue appellant raises, and that the Act is not constitutionally infirm. In particular, we find the discussion of this issue in *United States v. Piatti, supra,* 416 F. Supp. at 1205-1206, to be convincing and consistent with our conclusion herein. *Cf. United States v. Harper,* 530 F.2d 828 (9th Cir. 1976).

II

Appellant's second argument is that he cannot be charged with distributing a controlled substance under 21 U.S.C. § 841(a) for two reasons. First, because the persons who received the prescriptions were government agents and not "patients," the appellant contends that he did not *cause* the controlled substances

parties. The *Panama* case was influenced by exceptional executive disorganization and in absence of such a special factor would not be followed today. The *Schechter* case involved excessive delegation of the kind that Congress is not likely again to make." 1 Davis, *Administrative Law Treaties,* Section 2.01.

to be distributed (rather, he asserts, it was the agents). Second, he argues that the actions of the agents cannot be charged to him under a principal-agent theory as they are not innocent agents within the meaning of 18 U.S.C. § 2(b). Hence (his argument goes), he cannot be found to have participated in an essential element of 21 U.S.C. § 841(a), the ultimate distribution of a controlled substance. (All the prescriptions in evidence were obtained from appellant by government agents who falsely pretended they were "patients," or wanted to become such, while never intending to be such.)

The difficulty with appellant's argument is that the appellant was charged with *distributing* controlled substances in violation of § 841(a)(1). 21 U.S.C. § 802(11) states that: "The term 'distribute' means to deliver (other than administering or dispensing) a controlled substance"; and 21 U.S.C. § 812(8) states: "The term 'deliver' or 'delivery' means the actual, constructive or attempted transfer of a controlled substance, whether or not there exists an agency relationship." *See United States v. Bartee,* 479 F.2d 484, 486-487 (10th Cir. 1973). It is clear that, when a doctor steps out of the usual course of his professional duties and writes a prescription for someone for a controlled substance not pursuant to a legitimate medical purpose, he has initiated a transfer of that controlled substance. No one can fill a prescription until some person with authority to issue a prescription first writes and delivers it. No person, whether patient or imposter-patient, can have a prescription

filled "but for" a physician's original act of issuing the prescription. *See United States v. Ellzey,* 527 F.2d 1306, 1308 (6th Cir. 1976), *United States v. Green,* 511 F.2d 1062, 1072 (7th Cir. 1975), and *United States v. Hooker,* 541 F.2d 300 (1st Cir. 1976). It follows that by creating the means by which controlled substances can be transferred, a doctor "distributes" within the meaning of 21 U.S.C. § 841(a) by the act of writing a prescription outside the usual course of professional practice and not for a legitimate medical purpose. We hold that because the "patients" were government agents and that they, instead of the doctor, ultimately filled the prescriptions, does not affect the conviction of appellant herein.

III

Appellant's third argument is that the expert testimony of Dr. Frederick Meyers "on the ultimate issue" was improperly admitted. Dr. Meyers testified that the appellant was not prescribing drugs in the usual course of a professional practice and for a legitimate medical purpose. The ready answer to this asserted error is that because this case was tried in November 1976, and because Rule 704 of the Federal Rules of Evidence[3] was adopted January 21, 1975, there was no error.

All the cases cited by appellant in support of this claim of error were decided prior to January 25, 1975.

[3]Rule 704 of the Federal Rules of Evidence states that:
"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

The Government cites four cases which were decided after the Federal Rules of Evidence were adopted; all of which state the testimony of the kind to which appellant objects was admissible. *I.e., United States v. Robinson,* 544 F.2d 110, 113 (2d Cir. 1976); *United States v. McCoy,* 539 F.2d 1050, 1063 (5th Cir. 1976); *United Telecommunications Inc. v. American Television Com. Corp.,* 536 F.2d 1310, 1318 (10th Cir. 1976); *United States v. Alexander,* 526 F.2d 161, 169 (8th Cir. 1975). We find no error.

IV

Appellant's fourth argument is that the trial court should not have admitted into evidence Exhibits 21D and 21E because they were allegedly improperly obtained and because they were supposedly withheld from defense counsel.

We have here a technical problem with the record on this appeal, which we discussed at oral argument. It is sufficient to state that Exhibits 21D and 21E, two photographs, are not before this court on this appeal.[4]

While we are unable from the record to ascertain precisely what Exhibits 21D and 21E portray, we are convinced from references to such photographs in

[4](1) Rule 10 of the Federal Rules of Appellate Procedure provides that
"The original papers and *exhibits* filed in the district court . . . shall constitute the record on appeal in all cases."
(2) Appellant requested no exhibits to be included in the record on appeal.
(3) Appellee requested no exhibits to be included in the record on appeal.

both the Reporter's Transcript and the parties' briefs, that their admission, if error at all, was harmless error. *Chapman v. California,* 386 U.S. 18, 24 (1966). The exhibits were merely illustrative, cumulative, and corroborative of oral testimony in the record by witnesses Dalton, Detro and McClellan. We also note the Government's expert, Dr. Meyers, did not take such exhibits into consideration in coming to his expert opinion. We therefore hold there was no error justifying reversal.

V

Appellant's fifth argument is that the trial court erroneously instructed the jury on the third essential element of the 20 offenses charged in the indictment namely:

> "Now, *thirdly,* you must also find beyond a reasonable doubt that a physician, who knowingly and intentionally, did dispense or distribute by prescription certain controlled substances and did so other than in good faith and not in the usual course of a professional practice, and not in accordance with a standard of medical practice generally recognized and accepted in the United States."

In his brief to this court, appellant asserts that "the objection thereto can be found in R.T. November 19, 1976, pages 33-34."[5]

[5]This reference in Appellant's Brief to the pagination of the record is erroneous. It refers to page numbers apparently inserted in "dailies" requested by counsel during trial. The District Clerk's pagination is controlling. The reference should be to R.T. Vol. V, 916.

Appellant's counsel is correct in stating that his objection was made prior to the time the court instructed the jury, and when the instructions were settled.

Appellant's objection was that the instruction "seems to say if the doctor is guilty of malpractice, he can be found guilty of this crime." The court then read the instruction aloud, as quoted *supra* (including the fact that the doctor must knowingly dispense or distribute by prescription certain controlled substances) and *"did so other than in good faith"*; asking defendant's counsel "what's wrong with that?" (emphasis added). Defendant's counsel answered: "because it doesn't say a good faith attempt." The trial judge then re-read the instruction and declined to change it. We find no error.[6]

VI

Appellant's sixth contention was that there were improper arguments engaged in by the United States Attorney which amounted to plain error. A thorough

[6]A trial judge need not give an instruction proposed by counsel by either side, provided he gives adequate instructions on each element of the case.

> "A party has no vested interest in any particular form of instructions . . . the language of the instructions is for the trial court to determine. If on the entire charges it appears that the jury has been fairly and adequately instructed, the requirements of the law are satisfied." *United States v. Garcia-Rodriguez,* ..... F.2d ....., ... (decided August 10, 1977, 9th Cir.)

See also Tucker v. United States, 151 U.S. 164, 170, 14 S.Ct. 299, 38 L.Ed. 112 (1893); *United States v. Edwards,* 503 F.2d 838, 841 (9th Cir. 1974); *Amsler v. United States,* 381 F.2d 37, 52 (9th Cir. 1967); *Rivers v. United States,* 368 F.2d 362, 364 (9th Cir. 1966).

discussion of the alleged improper arguments took place at oral argument among the attorneys for the parties herein and the members of this panel.

Appellant cites good law—that a prosecutor may not state his personal belief in the guilt of a defendant (unless he asserts he is basing his belief on the strength of the evidence in the case), any more than counsel for the defendant may express his personal belief in his client's innocence (unless he asserts he is basing his belief on evidence alone). The Government attorney did not go so far as to state his personal beliefs as to the defendant's guilt. He did, however, engage in a rambling closing argument and in several instances had to be reminded by the trial judge to keep within evidence produced at trial.

Moreover, at the time of oral argument, it was asserted that several of the prosecutor's statements were necessary arguments to refute what counsel for the defendant had said, either during the trial, or during his opening statement. This is of particular significance in this case because, after the Government's six-page opening statement, the record discloses a 33-page opening statement made by counsel for the defendant—including the use of black-boards, diagrams and charts with heavy emphasis on what the defense counsel thought the law was,[7] or what he thought the evidence might be, and such statements as

[7]For example the defense attorney at one point states: "I think it is sufficient to say that the law states, in effect, that if a doctor writes a prescription for a drug without a medical purpose to a person who is not a patient, without a good faith belief that he is writing it for a medical purpose, that that's improper."

"that the jury must understand the kind of patients or the kind of doctor you are dealing with, a doctor with an office in the tenderloin area of San Francisco,[8] but that Dr. Davis has never left his patients, and I'm going to say that he has never abandoned his patients"; and "I think that one doctor said to me that: 'Thank Goodness, we have Dr. Davis . . . .'"

Counsel for defendant described his client to be a person of advancing age, "has limited use of his left arm," "is practically blind in one eye," and

> "he had an unfortunate experience in connection with his daughter (who) committed suicide, and I am saying this not to generate any sympathy. We are not entitled to under the evidence (sic) but only to give you some insight into the things that limit a person's view of their own abilities and their own way of practicing law (sic) and I will say this to you, that under the law as it's written, I am entitled to bring in evidence, and I will say this first. It doesn't apply to Dr. Davis, but I am entitled to bring, in law, bring in evidence to you indicating that Dr. Davis would be an incompetent doctor and say even if you believe he is incompetent, he is entitled to an acquittal unless he possesses that quality of mind the absence of which requires a conviction; that is to say, the absence of good faith. We are not saying that's true of Dr. Davis. It certainly isn't true, but in any event, these events and circumstances as they apply to Dr. Davis, as they apply to his

[8]"[This] is an area where you might expect to find underprivileged and poor people, people who have had afflictions in regard to alcoholism, people who have had emotional disturbances . . . who are the down and out, the sufferers, the under-belly of society . . . asking for help to a man who is kindly, who is known . . . as being sympathetic."

practice of medicine, do have relevance with the frame of mind in regard to the frame of mind in which he views people as they come up the stairs of his office, as they come into his office, and they say to him words which, to him, mean, 'Dr. Davis, I need help.'"

Counsel told the jury in his opening statement how he himself suffered from insomnia, how Dr. Davis *could* have given medical examination to all his patients, and "do all kinds of tests that are completely irrelevant to what (the patient is) talking about, and then send her a bill for 150 to 200 dollars . . . ."

We could continue a list of matters through which counsel for defendant was permitted to roam in his "opening remarks." We are reminded of the remarks of a judge of this court in *Barzeles v. Kulikowski,* 418 F.2d 869, n.1 (9th Cir. 1969), "We have a low opinion of the planting of this kind of corn in a federal courtroom."

The only significance to the unusual nature of the defendant's opening statement is to demonstrate that perhaps each side went beyond the usual limits of personal opinion in their arguments. However, we hold there was no reversible error. *United States v. Hoskins,* 446 F.2d 564, 565 (9th Cir. 1971).

VII

Appellant's seventh alleged error raises the question of the sufficiency of the evidence to convict. Both the jury and the trial judge determined there was sufficient evidence. Looking at the evidence in the light

most favorable to the prosecution, as we must in this case, *Glasser v. United States,* 315 U.S. 60, 80 (1942), there is no question but that the evidence was sufficient to justify conviction. *United States v. Badia,* 490 F.2d 296, 299 (1st Cir. 1973).

VIII

The eighth issue raised (that 21 U.S.C. § 841 does not contemplate multiplicious charges) is of no merit.[9] *United States v. Moore,* 423 U.S. 122 (1975), *United States v. Hooker,* 541 F.2d 300, 305 (1st Cir. 1976); *United States v. Noel,* 490 F.2d 89, 90 (6th Cir. 1974). Successive prosecutions for separate offenses arising out of separate transactions are not violative of due process. *Sanchez v. United States,* 341 F.2d 225, 229 (9th Cir.), *cert. denied,* 382 U.S. 856 (1965).

AFFIRMED.

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[9]In this case, of the 20 counts filed, all related to different dates, except 2/25/76, 3/10/76, 3/23/76, 3/31/76, on which dates there were, respectively, 2, 4, 2, and 3 prescriptions written. Each prescription was for a different Section II controlled substance, except on 3/10/76. On that date, there were two prescriptions for "Ritalin."

Thus, all were prosecutions for allegedly separate offenses arising out of factually distinct transactions, and there was no denial of due process. *Cf. Sanchez v. United States,* 341 F.2d 225, 229 (9th Cir.), *cert. denied,* 382 U.S. 856 (1965).

In *United States v. Moore,* 423 U.S. 122 (1975), the indictment covered 639 counts alleging unlawful distribution and dispensation of Methadone (21 U.S.C. § 841(a)(1)), over a 5½ month period. These were reduced before the trial to 40 counts, and the defendant doctor was convicted on 22 counts.

Appendix 3

In the United States Court of Appeals
for the Ninth Circuit

No. 76-3720

United States of America, Appellee,
vs.
Irving Davis, M.D., Appellant.

[Filed Nov. 11, 1977]

ORDER

Before: BARNES and WRIGHT, Circuit Judges, and JAMESON, District Judge.*

The panel hearing this case unanimously denies the Petition for Rehearing.

*Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

Appendix 4

21 U.S.C. § 811. Authority and criteria for classification of substances—Rules and regulations of Attorney General; hearing

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney Gen-

eral (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation of recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

Factors determinative of control or removal from schedules

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

International treaties, conventions, and protocols requiring control

(d) If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

Immediate precursors

(e) The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

Abuse potential

(f) If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has

an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

Non-narcotic substances sold over the counter without a prescription; dextromethorphan

(g) (1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after the date of such enactment pursuant to the foregoing provisions of this section.

Pub.L.91-513, Title II, § 201, Oct. 27, 1970, 84 Stat. 1245.

Appendix 5

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21 U.S.C. § 812. Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated: . . .

Appendix 6

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21 U.S.C. § 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing

a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term

of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260.